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No. 05-380

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ARKANSAS, FLORIDA, INDIANA, MISSOURI, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

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INTEREST OF *AMICI CURIAE*

The *amici* States, through their Attorneys General, respectfully submit this brief in support of Petitioner. Although this appeal concerns the constitutionality of the federal government's ban on partial-birth abortion, regulation of abortion-related conduct is primarily a state activity, and there is widespread interest among the States in banning partial-birth abortion. In the past decade, thirty-one States have passed legislation restricting partial-birth abortion.[1]

Many of these state statutes were invalidated or rendered unenforceable by the Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which held that Nebraska's partial-birth abortion ban was unconstitutional on its face. The *amici* States believe that *Stenberg* misapplied the relevant substantive standard announced in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), undermining the Court's commitment in *Casey* to an abortion jurisprudence that would respect and give appropriate weight to the vital state interests at play in this sensitive context, *see id.*, at 871.

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1. *See* ALA. CODE §§26-23-1 to -6; ALASKA STAT. §18.16.050; ARIZ. REV. STAT. §13-3603.01; ARK. CODE ANN. §§5-61-202, -203; FLA. STAT. ANN. §§390.011, 782.32 – .36; GA. CODE ANN. §16-12-144; IDAHO CODE ANN. §18-613; 720 ILL. COMP. STAT. 513/10; IND. CODE ANN. §§16-34-2-1, 16-18-2-267.5; IOWA CODE ANN. §707.8A; KAN. STAT. ANN. §65-6721; KY. REV. STAT. ANN. §§311.720, .765; LA. REV. STAT. ANN. §14:32.9; MICH. COMP. LAWS ANN. §§333.1081-.1085, .17016; MISS. CODE ANN. §41-41-73; MO. REV. STAT. §565.300; MONT. CODE ANN. §§50-20-102, -401; NEB. REV. STAT. §§28-326, -328; N.J. STAT. ANN. §2A:65A-6; N M. STAT. ANN. §§30-5A-1 to -5; N.D. CENT. CODE §§14-02.6-01 to -03; OHIO REV. CODE ANN. §2919.151; OKLA. STAT. tit. 21, §684; R.I. GEN. LAWS §§23-4.12-1 to -6; S.C. CODE ANN. §44-41-85; S.D. CODIFIED LAWS §34-23A-27; TENN. CODE ANN. §39-15-209; UTAH CODE ANN. §§76-7-301, -326; VA. CODE ANN. §18.2-74.2; W.VA. CODE ANN. §§33-42-3, -8; WIS. STAT. §940.16.

The *amici* States urge the Court to recognize the governmental interests implicated by partial-birth abortion, and to reaffirm its commitment to an abortion jurisprudence that accords to these critical interests the weight they are due.

The *amici* States are also interested in the Court's resolution of the appropriate standard for federal-court review of facial challenges to abortion-related regulations. The traditional rule, definitively articulated by the Court in *United States v. Salerno*, 481 U.S. 739, 745 (1987), is that those who seek to prevent a statute from being applied in any and all circumstances must show that the statute in fact cannot be validly applied in any and all circumstances.

The *amici* States have a strong interest in ensuring that their state statutes are treated uniformly by federal courts that are entertaining facial challenges, and believe that the *Salerno* rule is appropriate for all such challenges, including challenges to statutes regulating abortion-related conduct. In resolving this appeal, this Court should reject the court of appeals's conclusion to the contrary.

SUMMARY OF THE ARGUMENT

The *amici* States urge the Court to overrule *Stenberg v. Carhart*. In the considered judgment of the *amici* States, the Court's analysis in *Stenberg* suffered from three critical errors:

First, the *Stenberg* decision failed to give appropriate weight to the multiple state interests advanced by bans on partial-birth abortion. Such bans promote at least four important governmental interests: they draw a bright line distinguishing abortion from infanticide; they help to preserve the integrity of the medical profession; they encourage respect for human life; and they prevent unnecessary cruelty to the aborted fetus. *Stenberg* recognized most of these interests, but held that they could not "make any difference" to the constitutional calculus if partial-birth abortion might sometimes be marginally safer for the mother than the alternative methods of late-term abortion. 530 U.S., at 931-32. This constitutional elevation of one factor above every other implicated state interest was error. *See Casey*, 505 U.S., at 871-73.

Second, *Stenberg*'s health-exception analysis disregarded the relevant undue-burden standard as well as the traditional rule that legislatures are free to act in the face of medical uncertainty. Rather than asking whether the ban's lack of a maternal-health exception placed an undue burden on a woman's decision to terminate her pregnancy, *see Casey*, 505 U.S., at 877, *Stenberg* asked whether there was a consensus that partial-birth abortion would never be the safest late-term abortion procedure, 530 U.S., at 932. This treatment of consensus in the medical community as a dispostive constitutional factor was in sharp conflict with the Court's longstanding assumption that legislatures have authority to make difficult policy choices "even upon medical matters concerning which there is a difference of opinion and dispute." *Collins v. Texas*, 223 U.S. 288, 297-98 (1912).

Third, *Stenberg* erred in rejecting a plausible construction of the state ban that might have saved it from invalidation. Notwithstanding that the statute purported to reach only partial-birth abortion and that the State's Attorney General insisted that the state courts would read the ban to reach only partial-birth abortion, the Court in *Stenberg* invalidated the ban on the ground that it could theoretically be read to reach another method of late-term abortion, "and future Attorneys General may choose" to read it in that manner. 530 U.S., at 945. That conclusion was in conflict with a rule of statutory construction that "has for so long been applied by this Court that it is beyond debate"—that is, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

There is a second issue of great significance to the *amici* States squarely raised by this appeal: the appropriate standard for federal-court review of facial challenges to abortion-related regulation. The *amici* States urge the Court to reaffirm that, in the abortion context as elsewhere, those who seek to prevent a properly-enacted statute from being applied in any and all circumstances should be required to show that it cannot be validly applied in any and all circumstances. That is the rule of *Salerno*, 481 U.S., at 745, and it is a sound one.

Although the rule received its definitive articulation in *Salerno*, it is grounded in constitutional and prudential limitations on the power of federal courts that have been recognized and respected by decisions of the Court as far back as *Marbury v. Madison*. Federal courts are not "roving commissions assigned to pass judgment on the validity of the Nation's laws," *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); they are instead tasked with "resolving concrete disputes brought before the courts for decision," and must decline to apply a statute "when such an application of the statute

would conflict with the Constitution." *Younger v. Harris*, 401 U.S. 37, 52 (1971). Only when every application would conflict with the Constitution, therefore, should federal courts find a statute wholly invalid.

In addition to these institutional limitations on federal court power, principles of federalism counsel further restraint when federal courts are asked to review the constitutionality of laws enacted by a state legislature. In such cases, application of the *Salerno* rule discouraging facial invalidation creates salutary opportunities for state courts "to construe a law to avoid constitutional infirmities." *New York v. Ferber*, 458 U.S. 747, 768 (1982).

There is no good reason not to apply the *Salerno* rule to facial challenges to legislation regulating abortion-related conduct. Indeed, the Court has explicitly chosen to apply the rule to such challenges on more than one occasion. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) ("*Akron II*"). It should do so again here.

The court of appeals's failure to apply the *Salerno* rule to this facial challenge to the federal partial-birth abortion ban resulted in an unjustified invalidation of the act, in its entirety, "based upon a worst-case analysis that may never occur." *Akron II*, 497 U.S., at 514. Under *Salerno* and *Casey*, the proper question for the court of appeals was whether Respondents had demonstrated that the federal partial-birth abortion ban, in each and every of its potential applications, poses a substantial obstacle to a woman seeking to abort her late-term, but still nonviable, fetus. *Salerno*, 481 U.S., at 745; *Casey*, 505 U.S., at 877. Had the court of appeals asked that question, the correct result in this case would have been clear: the federal partial-birth abortion ban should be upheld.

ARGUMENT

I. *STENBERG V. CARHART* WAS INCORRECTLY DECIDED AND SHOULD BE OVERRULED.

The court of appeals held that the fate of the federal ban on partial-birth abortion was sealed by the Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which struck down Nebraska's partial-birth abortion ban on the grounds that it lacked a health exception and that it might be read to reach another, more common method of late-term abortion. *Id.*, at 937-38, 945-46; *see also Carhart v. Gonzales*, 413 F.3d 791, 796 (CA8 2005). The United States advances sound reasons why, given the extensive congressional findings, *inter alia*, the federal Partial-Birth Abortion Ban Act should survive *Stenberg*. But those federal distinctions provide little solace to States seeking to pass their own legislation prohibiting the practice of partial-birth abortion. Rather than simply distinguishing *Stenberg*, the Court should take the direct route: because *Stenberg* undervalued the important state interests advanced by banning partial-birth abortion, disregarded the undue-burden standard in its health-exception analysis, and rejected a plausible construction of the state ban that might have saved it from invalidation, the *amici* States urge the Court to recognize that *Stenberg* was wrongly decided, and, accordingly, to overrule it.

A. *Stenberg* Undervalued the State Interests Advanced by Bans on Partial-Birth Abortion.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), that the Due Process Clause extends to cover a woman's choice to have an abortion before the fetus is viable. But the Court in *Casey* expressly rejected *Roe*'s trimester framework and the strict scrutiny that had previously been applied to abortion-related regulations as undervaluing the important and

legitimate state interests at play in the abortion context. *Casey*, 505 U.S., at 871-73.

Casey recognized that although *Roe* had spoken "with clarity" of the States' "important and legitimate interest in potential life," that particular "portion of the decision in *Roe* [had] been given too little acknowledgment and implementation by the Court in its subsequent cases." *Casey*, 505 U.S., at 871; *see also Roe*, 410 U.S., at 163. Thus, the new standard announced in *Casey* was intended to ensure that these interests would be accorded sufficient respect and weight going forward, and that the States would be "free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Casey*, 505 U.S., at 873. Under *Casey*'s new standard, "[o]nly where state regulation imposes an undue burden on a woman's ability" to choose an abortion would the statute be considered to infringe "the liberty protected by the Due Process Clause." *Id.*, at 874.

Though *Casey* promised an abortion jurisprudence in which important state interests would be given the respect they are due, *Stenberg* failed to make good on that promise, and failed to accord any real weight to the public interests justifying partial-birth abortion bans—interests recognized as legitimate, even compelling, by a majority of state legislatures as well as our national Congress.

1. Partial-birth abortion bans advance important state interests.

Partial-birth abortion bans advance at least four important state interests: they draw a bright line that clearly distinguishes between abortion and infanticide; they help to preserve the integrity of the medical profession; they promote respect for human life; and they prevent unnecessary cruelty to the aborted fetus.

Once completely outside the mother's body, a child is a legal person entitled to full constitutional protection. U.S. CONST.

amend. XIV, §1. Prohibitions on partial-birth abortion are designed to prevent the unnecessary death of those substantially outside the mother's body, "mere inches away" from becoming a constitutional person. *Partial-Birth Abortion Ban Act of 2003* ("PBABA"), Pub. L. No. 108-105, §2(14)(H), 117 Stat. 1205; *see also* OHIO REV. CODE ANN. §2919.151; 2000 Ohio Laws H 351, §3(A). Such laws recognize partial-birth abortion's "resemblance to infanticide," *Stenberg*, 530 U.S., at 963 (Kennedy, J., dissenting), and advance a critical interest in "maintaining a strong public policy against infanticide, regardless of the life expectancy or stage of development of the child," 2000 Ohio Laws H 351, §3(B); *see also* MICH. COMP. LAWS ANN. §333.1082(c); MO. REV. STAT. §565.300(3). This interest in drawing a bright line between abortion and infanticide is directly analogous to the state interest the Court relied upon in *Washington v. Glucksberg*, 521 U.S. 702 (1997), as justifying a state ban on assisted suicide. *See id.*, at 732 (recognizing as legitimate the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia").

The Court in *Glucksberg* also recognized that States have an "interest in protecting the integrity and ethics of the medical profession." *Id.*, at 731; *see also Stenberg*, 530 U.S., at 962 (Kennedy, J., dissenting) ("A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others."). Bans on partial-birth abortion advance this important interest because, as Congress has found, partial-birth abortion "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child." PBABA, §2(14)(K), 117 Stat. 1205; *see also Stenberg*, 530 U.S., at 963 (Kennedy, J.,

dissenting) (noting that state legislatures might rationally conclude that partial-birth abortion "presents a greater risk of disrespect for life and a consequent greater risk to the [medical] profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect").

Partial-birth abortion bans also promote a respect for life. The *amici* States agree with Congress that the partial-birth abortion procedure reflects a "disregard for infant human life," and permitting its practice threatens to "further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." PBABA, §2(14)(L), (N), 117 Stat. 1206; *see also* MONT. CODE ANN. §50-20-102(2)(e) ("the state has a duty to protect innocent life and that duty has grown to a compelling point with respect to partial-birth abortion"); *Stenberg*, 530 U.S., at 961 (Kennedy, J., dissenting) ("States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause . . . society as a whole to become insensitive, even disdainful, to life, including life in the human fetus.").

Bans on partial-birth abortion may also further a state interest in preventing unnecessary cruelty to the aborted late-term fetus. As the State of Ohio has determined, this interest is based in part on the ability of a late-term fetus to experience pain, but does not rest solely on that ground: "[t]he indignity of being partly delivered before being deliberately killed is also a form of cruelty that should not be unnecessarily inflicted upon any being of human origin. Therefore, there are legitimate reasons for deterring the unnecessary use of the partial birth procedure, even though other abortion procedures that may cause pain remain available." 2000 Ohio Laws H 351, §3(D); OHIO REV. CODE ANN. §2919.151; *see also, e.g.*, PBABA, §2(14)(M), 117 Stat. 1206 (finding that, during a partial-birth abortion, "the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain").

2. *Stenberg* acknowledged, but gave no weight to, these important state interests.

The Court in *Stenberg* recognized these interests advanced by Nebraska's partial-birth abortion ban, but dismissed them with the passing observation that it did not "see how [those interests] could make any difference to the question at hand." 530 U.S., at 931. That question, the Court reasoned, was whether Nebraska's ban was required to contain a health exception if "significant medical authority supports the proposition that in some circumstances [a partial-birth abortion] would be the safest procedure." *Id.*, at 932.

In providing an affirmative answer to that question and striking down Nebraska's ban because it lacked a health exception, the Court effectively elevated an interest in marginal safety above every other state interest at play in the partial-birth abortion context. Under *Stenberg*'s logic, "other available procedures might be deemed safe—even safer than natural childbirth—but if there is a marginally safer alternative in the opinion of some credible professionals, the state must make it available, no matter how morally repugnant society deems that method." *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 291 (CA2 2006) (Walker, C.J., concurring).

That result is fundamentally at odds with *Casey*'s assurance that States would be permitted to advance important governmental abortion-related interests, provided that the regulations promoting those interests "in no real sense deprived women of the ultimate decision" to terminate a pregnancy. *Casey*, 505 U.S., at 875. As Justice Kennedy noted in powerful dissent, the *Stenberg* decision "repudiates [*Casey*'s] understanding by invalidating a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon the right." *Stenberg*, 530 U.S., at 957 (Kennedy, J., dissenting); *see also Nat'l Abortion Fed'n*, 437 F.3d, at 292

(Walker, C.J., concurring) ("I cannot square the undue burden standard of *Casey* with a holding that, while conceding the existence of alternative safe procedures, denies legislatures the ability to promote important interests above the conferral upon some citizens of a marginal health benefit.").

B. *Stenberg*'s Health-Exception Analysis Disregarded *Casey*'s Undue-Burden Standard and the Rule That Legislatures Are Free to Act in the Face of Medical Uncertainty.

Stenberg's enshrinement of marginal safety ensured that the countervailing state interests that *Casey* attempted to resuscitate would once again be systematically undervalued by the federal courts. But that was not the decision's only error. *Stenberg*'s health-exception analysis also disregarded the undue-burden standard announced in *Casey* as well as the traditional rule that legislatures are empowered to make difficult policy choices in the face of medical uncertainty.

1. *Stenberg* disregard *Casey*'s undue-burden standard.

In declining to adopt a health exception, both Congress and the States share a real concern that including an unnecessary health exception could dramatically undermine the effectiveness of any ban on partial-birth abortion.[2] And when such a ban, with or

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2. Both the majority and the dissenting opinions in *Stenberg* recognized the potential consequences of an unnecessary or overly broad health exception. 530 U.S., at 938; *id.*, at 967-69 (Kennedy, J., dissenting); *id.*, at 1011-13 (Thomas, J., dissenting). Congress received testimony to similar effect when considering the federal partial-birth abortion ban. *See, e.g., Partial-Birth Abortion Ban Act of 2003: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 26 (2003) (statement of Gerard V. Bradley, Professor of Law, Univ. of Notre Dame) ("I understand the logic of the draftsmanship here,

without an exception for maternal health, "in no real sense deprives women of the ultimate decision" to secure an abortion, then it places no undue burden on women under *Casey*. *Id.*, at 875.

Rather than asking, as it should have, whether the ban's lack of a maternal health exception deprived a woman of the decision to terminate her pregnancy, *Stenberg* asked whether there was an existing consensus in the medical community that no circumstance could ever arise in which a partial-birth abortion would be the safest late-term abortion procedure. 530 U.S., at 932. And because the Court determined that "medically related evidentiary circumstances" revealed no such consensus, it held that the Constitution required Nebraska's ban to contain a health exception. *Id.*, at 937; *see also Planned Parenthood Fed'n of America v. Gonzales*, 435 F.3d 1163, 1175 (CA9 2006) (holding that *Stenberg* requires the federal ban to include an exception because "no medical consensus exists that the abortion procedures outlawed by the Act are never necessary to preserve the health of a woman").

By its terms, *Stenberg*'s health-exception analysis was altogether unmoored from the question that *Casey* held must anchor the Court's abortion jurisprudence: whether the regulation at issue poses "a substantial obstacle to the woman's exercise of the right to choose" an abortion. *Casey*, 505 U.S., at 877. And for that reason, it is ill-suited for use in distinguishing between those abortion-related regulations that comport with constitutional requirements

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and that is the fear, which I think to be reasonable and well grounded, that if there is a health exception engrafted or put into this bill, then the prohibition itself would become toothless and ineffective in light of the fact, if it is the fact, that there are no cases of genuine health necessity or medical necessity. It would seem to me that a health exception would be mischievous.").

and those that unjustifiably infringe upon a woman's Due Process Clause liberties. *See id.*, at 874.[3]

2. *Stenberg* disregarded the traditional rule that legislatures are free to act in the face of medical uncertainty.

Stenberg's medical-consensus-based mode of analysis disregarded not only *Casey*'s standard for measuring the constitutionality of abortion-related regulation, but also the Court's longstanding assumption that legislatures have a rightful authority to make difficult policy choices in the field of medicine generally, "even upon medical matters concerning which there is a difference of opinion and dispute." *Collins v. Texas*, 223 U.S. 288, 297-98 (1912).

A lack of consensus in the medical community has never been thought to force a legislature's hand in fashioning a state-wide approach to public health issues—"[i]n fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997); *see also, e.g., Marshall v. United States*, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite

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3. As *Casey* held, "[n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.*

legislation, even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices."); *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926) (reasoning that where "[h]igh medical authority" is in conflict, "it would, indeed, be strange if Congress lacked the power to" make its own determinations); *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905) ("The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which [address the issue] according to the common belief of the people.").

Even assuming there is some division of responsible medical opinion concerning the comparative health risks associated with various late-term abortion procedures—though Congress found none, *see, e.g.*, PBABA, §2(14)(B), 117 Stat. 1204 (finding "no credible medical evidence that partial-birth abortions are . . . safer than other abortion procedures")—that division should not bind a legislature's hands when it attempts to protect and promote the important state interests threatened by one of those late-term procedures. As long as the government continues to make "available to women an objectively safe and convenient means to terminate a pregnancy, it is inappropriate for a court to preclude the legislature from making a reasonable policy judgment about a particular procedure." *Nat'l Abortion Fed'n*, 437 F.3d, at 296 (Walker, C.J., concurring). The Court should take this opportunity to repudiate *Stenberg*'s conclusion to the contrary.

C. *Stenberg* Erred in Rejecting a Plausible Construction of the State Statute That Might Have Saved it From Invalidation.

Nebraska's ban only purported to reach partial-birth abortion, *see* NEB. REV. STAT. ANN. §28-328(1); *see also Stenberg*, 530 U.S., at 939 (recognizing that the "statute's basic aim" was to ban partial-

birth abortion), and Nebraska's Attorney General insisted that the State's courts would read the ban to reach only partial-birth abortion, *see id.*, at 940. Nevertheless, noting that the state statute's language failed to precisely "track the medical differences" between partial-birth abortion and another late-term procedure in more common use, *id.*, at 939, the Court held Nebraska's ban constitutionally invalid on the additional ground that it might theoretically be read to reach this more common late-term procedure, *id.*, at 945-46.[4]

Congress responded to *Stenberg*'s holding on this issue by drafting the federal ban with far greater precision. *See* PBABA, §3, 117 Stat. 1201, 1206-1207.[5] Likewise, at least six state legislatures also responded by enacting partial-birth abortion bans employing similar, substantially more precise language than was used in the Nebraska statute. *See* FLA. STAT. ANN. §782.32; MO. REV. STAT.

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4. Nebraska's ban forbade "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child." NEB. REV. STAT. §28-326(9). In finding the ban too broad, the Court focused on the term "substantial portion," reasoning that with this language the statute might be read to cover the more commonly used procedure known as "D&E," in which "a foot or arm is drawn through the cervix" before the fetus is killed. *Stenberg*, 530 U.S., at 939.

5. The federal prohibition is triggered only when, among other requirements, "in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." *Id.* This language should not be susceptible to the charge the Court leveled at Nebraska's ban—it cannot reasonably be read to reach the alternative "D&E" procedure in which "a foot or arm is drawn through the cervix" before the fetus is killed. *See Stenberg*, 530 U.S., at 939.

§565.300; N.D. CENT. CODE §14-02.6-01; OHIO REV. CODE ANN. §2919.151; UTAH CODE ANN. §76-7-301; VA. CODE ANN. §18.2-74.2.

Although the language in these newer statutes should have neutralized *Stenberg*'s concern with the lack of precision in Nebraska's ban, the States have ample reason to fear that it has not—for notwithstanding the painstaking care and substantially greater precision with which the newer state bans on the procedure were drafted, only one has been upheld in the lower federal courts. *See Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 453 (CA6 2003) (upholding Ohio's ban); *A Choice for Women v. Butterworth*, No. 00-182-0CIV, 2000 WL 34403086, at *3 (S.D. Fla. July 11, 2000) (invalidating Florida's ban); *Reprod. Health Servs. of Planned Parenthood v. Nixon*, 325 F.Supp.2d 991, 994-95 (W.D. Mo. 2004), *aff'd*, 429 F.3d 803 (CA8 2005) (invalidating Missouri's ban); *Richmond Med. Ctr. for Women v. Hicks*, 301 F.Supp.2d 499, 515 (E.D.Va. 2004), *aff'd*, 409 F.3d 619 (CA4 2005) (invalidating Virginia's ban).[6]

The *amici* States believe that much of the difficulty facing legislatures attempting to draft partial-birth abortion bans that can survive federal-court challenge is due to the approach taken in *Stenberg*. Unfortunately, *Stenberg* can be read (and has been read) as an endorsement of the proposition that a state statute that *might* be read to reach protected conduct *should* be read to reach protected conduct. *See* 530 U.S., at 939-45; *see also Planned Parenthood Fed'n of America v. Ashcroft*, 320 F.Supp.2d 957, 973-74 (N.D. Cal. 2004); *Hicks*, 301 F.Supp.2d, at 513-17; *Butterworth*, 2000

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6. When suit was brought against the 2004 amendments to Utah's partial-birth abortion ban, the state defendants stipulated to the entrance of a temporary restraining order based on the Utah statute's substantial similarity to the federal and Virginia laws that had recently been enjoined. The North Dakota ban has not to date been challenged.

WL 34403086, at *3. The *amici* States urge the Court to reconsider and explicitly reject that approach, for it is in sharp conflict with a rule of statutory construction that "has for so long been applied by this Court that it is beyond debate"—that is, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *see also Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts.").

And the fact that partial-birth abortion bans target a procedure sometimes described with slightly different terms by its medical practitioners should have no impact on the application of the rule that courts must construe those statutes to avoid constitutional conflict whenever possible. Contrary to *Stenberg*'s suggestion that state partial-birth abortion bans should "track" the terminology used by abortion practitioners, *see* 530 U.S., at 939, the Court has previously made clear that "[l]egal definitions . . . need not mirror those advanced by the medical profession." *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) ("[W]e have traditionally left to legislators the task of defining terms of a medical nature that have legal significance."). Partial-birth abortion bans intended to ban only partial-birth abortion should be construed to ban only partial-birth abortion, and measured against the proper constitutional standard on that basis.

Stenberg's failure to construe Nebraska's statute so as to avoid constitutional difficulties—a construction that would have been in line with what all conceded was the legislature's "basic aim," *see* 530 U.S., at 939—has not been lost on the lower courts, as their repeated, summary invalidation of more carefully crafted state partial-birth abortion bans demonstrates, *see Hicks*, 301 F.Supp.2d,

at 515; *Butterworth*, 2000 WL 34403086, at *3. In upholding the federal ban, the Court should reaffirm the rule that statutes must be read to avoid constitutional conflict whenever possible.

II. FACIAL CHALLENGES TO STATUTES REGULATING ABORTION-RELATED CONDUCT SHOULD BE SUBJECT TO THE "NO SET OF CIRCUMSTANCES" TEST.

There is another issue raised by this appeal that is of great significance to the *amici* States: the appropriate standard for reviewing facial challenges to abortion-related regulation.

Typically, a plaintiff seeking to overturn a validly-enacted statute as unconstitutional on its face "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Although neither *Casey* nor *Stenberg* directly addressed the issue, the court of appeals concluded that the Court's resolution of those cases was "fundamentally inconsistent" with the traditional "no set of circumstances" test articulated in *Salerno*. *Gonzales*, 413 F.3d, at 794; *see also, e.g., A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (CA7 2002) (noting that, in *Stenberg*, "without so much as a mention of *Salerno*, the Court held invalid, in a pre-enforcement challenge, an abortion statute that might have been construed . . . to have at least some proper applications"). Acknowledging that the Court has never explicitly disclaimed application of the "no set of circumstances" test to abortion-related regulations, the court of appeals nevertheless determined to "apply the test from *Stenberg*, rather than the one from *Salerno*." *Gonzales*, 413 F.3d, at 795.

Not only has the Court never disclaimed application of the *Salerno* rule in the abortion context, it has deliberately chosen to apply the test in challenges to abortion-related regulations on at least two separate occasions. The *Salerno* rule is longstanding; it is compatible with the Court's abortion jurisprudence; and most

importantly, it safeguards the proper relationship between state legislatures and the federal courts. The Court did not reach the question last Term in *Ayotte v. Planned Parenthood of N. New England*, 126 S.Ct. 961 (2006); it should do so here. The *amici* States urge the Court to expressly reaffirm that facial challenges to statutes regulating abortion-related conduct remain subject to the traditional "no set of circumstances" test.

A. The *Salerno* Rule Has Long Been a Fixture of the Court's Jurisprudence.

Due to its clear articulation in *Salerno*, the "no set of circumstances" test has come to be identified with that case. 481 U.S., at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). But the general rule did not first appear in the Court's jurisprudence in *Salerno*; even prior to that case its application was longstanding.[7] And since *Salerno*'s

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7. *See, e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (noting that a statute "may be considered invalid 'on its face' . . . [if] it is unconstitutional in every conceivable application"); *Sec'y of State of Maryland v. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) (stating that a facially invalid statute "in all its applications falls short of constitutional demands"); *New York v. Ferber*, 458 U.S. 747, 767-68 (1982) (noting that facial-invalidity analysis is problematic in part because it is "undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation"); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (stating that those challenging a statute on its face must show that it is "invalid in toto—and therefore incapable of any valid application"); *Steffel v. Thompson*, 415 U.S. 452, 474 (1974) (same); *Broadrick*, 413 U.S., at 610 (noting that the challengers sought for the statute to "be struck down on its face and held to be incapable of any constitutional application");

articulation of the "no set of circumstances" test, the Court has cited and applied the rule many times.[8]

There is a simple and compelling justification for this great weight of authority supporting the "no set of circumstances" test for facial challenges to validly-enacted legislation. As Justice Scalia has explained, "before declaring a statute to be void in all its applications . . . , we have at least imposed upon the litigant the eminently reasonable requirement that he establish that the statute was *unconstitutional* in all its applications." *City of Chicago v. Morales*, 527 U.S. 41, 77-78 (1999) (Scalia, J., dissenting). Respondents here have asked the federal courts to find the federal partial-birth abortion ban unconstitutional in every conceivable application; it is thus eminently reasonable for the federal courts to require Respondents to show that this validly-enacted statute is in fact unconstitutional in every conceivable application.

Younger v. Harris, 401 U.S. 37, 53-54 (1971) (suggesting that facial invalidation is inappropriate unless the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it"); *Watson v. Buck*, 313 U.S. 387, 402 (1941) (same).

8. *See, e.g., Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (citing the *Salerno* rule); *Reno v. Flores*, 507 U.S. 292, 301 (1993) (noting that the *Salerno* rule applied to both the constitutional and statutory facial challenges before the Court); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (applying the *Salerno* rule to the facial challenge of an abortion-related regulation); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) ("*Akron II*") (same); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (noting that facial challenges are based on the claim that a statute is unconstitutional in all of its applications); *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in judgment) (applying *Salerno* to the facial challenge of an abortion-related regulation).

B. The *Salerno* Rule is Compatible With the Court's Abortion Jurisprudence.

Notwithstanding the weight of authority supporting application of the "no set of circumstances" test to facial challenges to validly-enacted legislation, many courts of appeals—including the court below—have concluded that facial challenges to abortion-related regulations are subject to their own, substantially more lenient tests. *See Gonzales*, 413 F.3d, at 795. In fact, a majority of the courts of appeals to consider the question have concluded that abortion-related regulations may be struck down *in toto* if they are determined to be unconstitutional in only a "large fraction" of the most relevant anticipated applications. *See Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 57-58 (CA1 2004), *rev'd on other grounds sub. nom. Ayotte v. Planned Parenthood of N. New England*, 126 S.Ct. 961 (2006); *Newman*, 305 F.3d, at 687; *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 143 (CA3 2000); *Planned Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022, 1027 (CA9 1999); *Women's Med'l Prof'l Corp. v. Voinovich*, 130 F.3d 187, 194-97 (CA6 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (CA10 1996); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (CA8 1995); *but see Manning v. Hunt*, 119 F.3d 254, 268 n.4 (CA4 1997); *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (CA5) ("[W]e do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes."), *cert. denied*, 506 U.S. 1021 (1992).

The courts have drawn this conclusion from language found in *Casey*: "[t]he unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which [the statutory provision at issue] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid." 505 U.S. 833, 895 (1992). Although this language can be read to suggest that

abortion-related legislation can be facially invalidated if shown to constitute an undue burden in only a "large fraction" of the relevant cases, the Court in *Casey* gave no indication that it intended to overrule *Salerno*. Indeed, just last Term the Court unanimously cautioned against reading too much into a facial invalidation under very similar circumstances. *See Ayotte*, 126 S.Ct., at 969 (noting that, although *Stenberg* invalidated Nebraska's partial-birth abortion ban on its face, "the parties [in that case] did not ask for, and we did not contemplate, relief more finely drawn).

It also is significant that *Casey*'s definition of "undue burden" makes no necessary connection between this substantive constitutional standard and the particular showing that must be made by plaintiffs seeking to facially invalidate statutes under that standard. 505 U.S., at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). Indeed, in her concurring opinion in *Webster*, Justice O'Connor expressly cited and applied *Salerno*'s "no set of circumstances" rule for facial challenges to state legislation, 492 U.S., at 524 ("[S]ome quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional."), and *simultaneously* reaffirmed her commitment to measuring abortion-related regulations by the substantive undue-burden standard, *id.*, at 530.

Salerno's "no set of circumstances" rule is thus not, as the court of appeals suggested, *Gonzales*, 413 F.3d, at 794, "inconsistent with" the undue-burden standard of *Casey*. The question is simply whether plaintiffs who are seeking to facially invalidate a statute on undue-burden grounds need to show that the statute constitutes an undue burden on a woman's abortion decision in *all* of its possible applications, or merely in some fraction of them. *See, e.g.*,

Manning v. Hunt, 119 F.3d 254, 269 (CA4 1997) ("[I]n order to succeed, Appellants are required to show that under no set of circumstances can the Act be applied in a manner which is not an undue burden.").

C. The Court Has Twice Applied the *Salerno* Rule in Facial Challenges to Abortion-Related Regulations.

Although neither *Casey* nor *Stenberg* directly addressed the question, on at least two occasions the Court has explicitly applied *Salerno*'s "no set of circumstances" test to facial challenges to abortion-related regulations. In *Rust*, 500 U.S., at 177-78, the Court took up a facial challenge to federal regulations "which limit the ability of Title X fund recipients to engage in abortion-related activities." The Court began its analysis by pointing out that,

> Petitioners are challenging the *facial* validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations . . . can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. *Id.*, at 183 (emphasis in original).

An extensive quote from *Salerno* followed. *Id.*

And in *Akron II*, which concerned an Ohio statute requiring parental notification prior to a minor's obtaining an abortion, the Court confirmed that, "because appellees are making a facial challenge to a statute, *they must show that 'no set of circumstances exist under which the Act would be valid.'*" 497 U.S., at 514 (emphasis added). The Court then criticized the court of appeals for invalidating Ohio's parental-notification statute "on a facial

challenge based upon a worst-case analysis that may never occur." *Id.*

The Court's admonishment in *Akron II* applies with equal force to the court of appeals's judgment here. The court of appeals's decision to strike down the federal partial-birth abortion ban in its entirety may fairly be said to rest on the hypothetical possibility that: 1) some woman, at some unspecified point in time, will desire to have a late-term abortion; 2) her doctor will determine that, among the possible methods he or she might use to terminate her pregnancy, the very safest one would require the doctor to "deliberately and intentionally vaginally deliver [the] living fetus until . . . the entire fetal head is outside the body of the mother" for the purpose of killing the fetus, and then to "perform[] the overt act . . . that kills the partially delivered living fetus," PBABA, §3(a), 117 Stat. 1206; and, 3) finally, that the woman would desire to have her late-term fetus aborted in this and only this manner.

Whether, in that "worst-case" scenario, the partial-birth abortion ban might constitute an undue burden on that hypothetical woman's ultimate decision to abort her late-term, nonviable fetus may be a difficult theoretical question. But with respect to the parties before this Court, it can be no more, for "[t]he delicate power of pronouncing [legislation] unconstitutional is not be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960).

D. The *Salerno* Rule Safeguards the Proper Relationship Between State Legislatures and the Federal Courts.

There are good reasons to reaffirm the Court's application of *Salerno* in the context of facial challenges to statutes regulating abortion-related conduct. *See Rust*, 500 U.S., at 183; *Akron II*, 497 U.S., at 514. The Court's established reluctance to determine a statute's facial validity by reference to "a worst-case analysis that may never occur," *Akron II*, 497 U.S., at 514, is grounded largely

in the truism that our Constitution limits the jurisdiction of federal courts to actual cases and controversies, *see Ferber*, 458 U.S., at 767 n.20; *Liverpool, N.Y. & Philadelphia S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (noting that a federal court "has no jurisdiction to pronounce any statute . . . void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies"); U.S. CONST. art. III, §2.

As the Court explained in its landmark decision in *Younger v. Harris*:

> Procedures for testing the constitutionality of a statute 'on its face' . . . and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. . . . [T]he task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. 401 U.S., at 52.

In other words, "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S., at 610-11.

And these institutional limitations on the power of federal courts to declare laws facially invalid are buttressed by important principles of federalism when the statute challenged in federal court has been enacted by a state legislature. In such situations, "focusing on the factual situation before" the Court, and rejecting a hypothetical worst-case-scenario analysis, "fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities." *Ferber*, 458 U.S., at 768; *see also Munson*, 467 U.S., at 976-78 (Rehnquist, J., dissenting) (explaining that analysis based upon the statutory application actually before the court "is less intrusive on the legislative prerogative and less disruptive of state policy" and "allows state courts the opportunity to construe a law to avoid constitutional infirmities"); *Stenberg*, 530 U.S., at 979 (Kennedy, J., dissenting) (noting that the federal district court's pre-enforcement injunction of the challenged State law "denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute"). In short, "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik*, 422 U.S., at 216.

The *amici* States urge the Court to acknowledge and affirm the Fourth Circuit's "observation that the logic of the *Salerno* test is necessary to show deference to legislatures, particularly in light of the limitation imposed by Article III of the Constitution that the judiciary act only in cases and controversies." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165 (CA4 2000); *see also* U.S. CONST. art. III, §2. And the judicious deference undergirding the *Salerno* test—inherent in the simple rule that a state statute will not be held unconstitutional in every conceivable application unless and

until it has been shown to be unconstitutional in every conceivable application—is no less appropriate for challenges to state laws regulating abortion-related conduct than for challenges to state laws regulating other forms of potentially protected conduct. *See, e.g.*, *Younger*, 401 U.S., at 38 (addressing a challenge to California's Criminal Syndicalism Act); *Broadrick*, 413 U.S., at 602 (addressing a challenge to Oklahoma's restriction on political activity by state employees).

As *Casey* observed, at stake in challenges to abortion-related statutes "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." 505 U.S., at 877. The States have an unquestioned authority to regulate certain abortion-related conduct, *see id.*, and the Court should ensure that their attempts to do so are reviewed by the federal courts with an appropriate caution and restraint, *see Erznoznik*, 422 U.S., at 216.

E. The Court Has Properly Limited "Overbreadth" Analysis to Speech-Related Claims Under the First Amendment.

Closely related to *Salerno*'s rule that a statute will be facially invalidated only when it has been shown to be unconstitutional in all of its applications, not merely some of them, *see* 481 U.S., at 745, is the traditional rule that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court," *Ferber*, 458 U.S., at 767; *see also Raines*, 362 U.S., at 21.

The Court has recognized a limited exception to this latter rule; an exception that has "come to be known as the First Amendment overbreadth doctrine." *Ferber*, 458 U.S., at 768. This exception, by which a person whose expressive conduct is unprotected may nevertheless challenge the statute at issue as overly broad, *see id.*, is "predicated on the sensitive nature of protected expression," *id.*,

and can be justified only by "weighty countervailing policies," *id.* (citation omitted). The First Amendment overbreadth doctrine is "strong medicine" that the Court has employed "only as a last resort." *Broadrick*, 413 U.S., at 613. And, as its name suggests, the Court has limited the doctrine to challenges brought under the First Amendment. *See, e.g., Salerno*, 481 U.S., at 745 ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.").

Some academic commentators have argued that the Court should expand the overbreadth doctrine to make its exception available to those challenging state statutes regulating abortion-related conduct. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 269-71 (1994). The *amici* States urge the Court not to do so. The First Amendment overbreadth doctrine is in some tension with the constitutional and prudential limitations on the federal judiciary's power discussed in the section above, and its exception to the traditional rule should be justified only in the context of protecting the freedom of expression, of which "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937).

Indeed, in *Roe v. Wade* itself, the Court took care to distinguish the liberty interests at issue, suggesting that overbreadth analysis is not appropriate in the abortion-regulation context: "[w]e are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under . . . *Younger v. Harris*, 401 U.S., at 50." *Roe*, 410 U.S. 113, 166 (1973). And, since *Roe*, the Court has rejected even that opinion's strict scrutiny as undervaluing the States' legitimate interests in regulating abortion-related conduct. *See Casey*, 505 U.S., at 875-77. In recognition of those legitimate interests, and of the important

differences between the right to speak and the right to choose an abortion, the Court should make clear that the First Amendment overbreadth doctrine does not apply to challenges to state statutes regulating abortion-related conduct.

III. THE FEDERAL PARTIAL-BIRTH ABORTION BAN SHOULD BE UPHELD AGAINST THIS FACIAL CHALLENGE.

Under *Salerno* and *Casey*, the question for the Court is whether Respondents have demonstrated in this case that the Partial-Birth Abortion Ban Act of 2003, in each and every of its potential applications, will pose a substantial obstacle to a woman seeking to abort her late-term, but still nonviable, fetus. *Salerno*, 481 U.S., at 745; *Casey*, 505 U.S., at 877. Because Respondents have not made that showing, the Court should uphold the ban against this facial challenge to its constitutionality.

In so doing, the Court should expressly reaffirm the applicability of the *Salerno* rule to abortion litigation and should overrule *Stenberg v. Carhart*.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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